Supreme Court, U.S.
FILED
FEB 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3) (4)

Nos. 88-1176 and 88-1184

In The

Supreme Court of the United States

October Term, 1988

VANE NEWTON and L. LEE BEARDSLY, ET AL.,

Cross-Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,

Cross-Respondents.

CROSS-RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS' MEMORANDUM IN OPPOSITION TO CROSS-PETITIONS

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Cross-respondent Brotherhood of Locomotive Engineers ("BLE") respectfully submits that the cross-petitions filed by the employees of the former Chicago, Rock Island & Pacific Railroad Company ("Rock Island") in Nos. 88-1169 and 88-1176, respectively, further support a grant of the petition for a writ of certiorari filed by BLE in No. 88-968. However, BLE urges the Court to grant its petition and that of petitioner Chicago & North Western Transportation Company ("CNW") in No. 88-994, rather than those of cross-petitioners.

The petition filed by BLE presents the very concise question of whether a court of appeals may provide an

arbitration remedy for locomotive engineers seeking to set aside a seniority implementing agreement, when that court has held that the action to set aside that agreement was time-barred under the six-month limitations period set forth in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and those employees' substantive claims did not lie in federal court. CNW filed the petition in No. 88-994, which raises questions as to whether the suit was timely filed in seeking an order to compel interest arbitration, *i.e.*, arbitration as to the substantive provisions of seniority issues already negotiated between the authorized bargaining representatives, and whether the timeliness of the arbitration ordered by the court of appeals is to be determined by the doctrine of laches, as the court below decided, or the six-month *DelCostello* limitations rule.

The cross-petitions of the former Rock Island employees attempt to raise additional issues not worthy of consideration by this Court and also unnecessary to resolution of the principal issue raised by all parties to these proceedings – the effect of the court of appeals' order upon the seniority implementing agreements. BLE submits that its petition in No. 88-968 and that of CNW in No. 88-994 set forth the proper framework for resolution of the issues in dispute, which the cross-petitions do not. This is so, because the cross-petitioners set forth issues which unnecessarily complicate the analysis and resolution of the principal issue – the effect of the direction to compulsory arbitration of the adequacy of the former Rock Island employees' seniority rights upon the rights of rail labor and management to negotiate upon that

subject under the March 4th Agreement and laws governing railroad labor relations.

In effect, cross-petitioners raise two peripheral questions to the principal issue. They suggest that a two-year limitations period, adopted from Section 3, First(r) of the Railway Labor Act, 45 U.S.C. §153, First(r), should be applied to all claims arising in the railroad industry, including hybrid claims, even though the duty of fair representation was fathered under the Railway Labor Act, the six-month *DelCostello* period has been uniformly applied to railroad breach of collective bargaining agreement and breach of duty of fair representation cases, and the claims of most cross-petitioners would be barred by either period. Cross-petitioners also assert that the courts below failed to properly canvass the record as to the facts supporting their view of the appropriate accrual date for their cause of action and their definition of equitable tolling doctrines, although there is no question that they rely solely on the unsupported allegations contained in the complaint, the record is devoid of any evidence submitted by them to establish any conflict as to the material issues of facts on the limitations issue, and they had multiple opportunities to engage in discovery and to submit affidavits in support of their legal contentions on this issue.

STATEMENT OF THE CASE

BLE is dissatisfied with the cross-petitioners' "statement." Detailed statements of the facts are set forth in the

respective petitions in Nos. 88-968 and 88-994. In particular, cross-petitioners' statement omits reference to the material findings and conclusions made by the trial court relative to the date of accrual of their claims and the inapplicability of the discovery and fraudulent concealment doctrines, which theories were raised before the lower courts and are again advanced before this Court.

In its April 16, 1986 decision, the district court held that the engine service employees' claims in *Newton* accrued on February 16, 1982, the date the implementing agreements were signed, "because (a) the injury about which plaintiffs complain became 'fixed and reasonably certain' at the time the implementing agreements were signed, and (b) the unions took no action of any consequence after that time. *See Hafer v. Air Line Pilots Association*, 525 F. Supp. 874, 877 (D. Hawaii 1981), *aff'd*, 698 F.2d 1230 (9th Cir. 1983), *quoting Archer v. Air Line Pilots Association*, 609 F.2d 934 (9th Cir. 1979), *cert. denied*, 446 U.S. 953 (1980)." (Pet. App. 109a).[1]

Cross-petitioners sought to avoid the time bar on the ground that the so-called "discovery rule" applied and "by asserting that the running of the limitations period was postponed until after May 18, 1983 because of 'fraudulent concealment' by the unions." (Pet. App. 110a, 111a).

Insofar as the running of the limitations period under the discovery rule, the district court cogently pointed out that "knowledge of injury and its immediate cause . . . starts the running of a limitations period under

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[1] "Pet. App." refers to Petitioner BLE's Appendix in No. 88-968.

the discovery rule, not the knowledge of whether that injury is legally actionable." (Pet. App. 110a). Because the *Newton* engine service employees knew of "the existence of the February 16, 1982 agreements and their effect on plaintiffs' seniority during the 15 months between the signing of those agreements and May 18, 1983," the district court found their challenge to the implementing agreements was time-barred.

The trial court then analyzed the facts before it under cross-petitioners' version of the discovery rule, which they admitted required them "to show also that they exercised due diligence within the six months after they learned about the seniority arrangements established by the February 16, 1982 agreements." (Pet. App. 111a). The district court said:

> Plaintiffs have failed to make such a showing. None of the plaintiffs states in his affidavit that he made any effort at any time prior to May 18, 1983 to investigate whether or not the implementing agreements had been ratified, who was involved in the negotiation of the agreements and whether anyone was excluded, or whether any provisions of the unions' constitutions had not been followed in the negotiation and/or signing of the agreements. Nor do any of the plaintiffs' affidavits state why they could not have investigated these matters prior to May 18, 1983. (*Id.*).

The district court also rejected cross-petitioners' argument that the "fraudulent concealment" tolling doctrine applied to their claims, for none of the individuals "demonstrate[d] the exercise of due diligence prior to May 18, 1983." (Pet. App. 112a). In addition, the district

court found that "neither plaintiffs' affidavits nor anything else in the record point to any wrongful concealment by the unions, much less any wrongful concealment by the CNW." (*Id.*). In this respect, the trial court pointed out that while there was not even any allegation of passive conduct, "silence or passive conduct is not sufficient." (*Id.*).

Finally, the district court rejected the cross-petitioners' attempt to establish a new rule that the fiduciary relationship between a union and its members is such that its mere silence is sufficient to excuse the member from exercising due diligence.

Subsequently, CNW and the unions filed dispositive motions in all cases. All parties had engaged in extensive discovery, and the former Rock Island employees had the opportunity between the entry of the April 16, 1985 decision of the trial court and oral argument on these motions on December 6, 1985 to take evidence or present affidavits to dispute or controvert the undisputed facts submitted by CNW and the unions. (Pet. App. 117a). Only two of the plaintiffs, however, presented any evidentiary material. Rather, "plaintiffs' counsel acknowledged that as to the statute of limitations defense most of the plaintiffs in these cases are essentially in the same position as the plaintiffs in *Newton*." (*Id.*). The district court declined to overrule its prior legal conclusions. (Pet. App. 116a). Accordingly, the trial court "considered the individual situation of each plaintiff against whom the statute of limitation defense is directed and finds that all claims arose more than six moths before the filing of the complaints." (Pet. App. 117a).

Thus, the trial court on at least two separate occasions carefully considered the accrual and tolling issues and found that the former Rock Island employees knew or had reason to know of their injury long before the six-month period prior to the commencement of the lawsuit and further that they had not presented any evidence controverting the proofs submitted by CNW and the unions on the limitations issue.

The court of appeals agreed with the district court that the unfair representation claims, except for the UTU-represented ground service employees, were "governed by the six-month statute of limitation set forth by the Supreme Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983.)" (Pet. App. 24a).

ARGUMENT

It is clear that all parties agree that the issues presented by the lower court decision should be reviewed by this Court. The rail carrier, the labor unions, and the former Rock Island employees all seem to believe that the lower court decision was wrongly decided. As we previously noted, the two basic points raised by cross-petitioners are not worthy of consideration by this Court and do not contribute to resolution of the principal issue involved.

1. Cross-petitioners have not presented any sufficient reason for this Court to grant their cross-petition upon their claim that the two year period for vacation of an adjustment board award under the limited review prescribed in Section 3, First (p) and (q) of the Railway

Labor Act, 45 U.S.C. §153, First (p), (q), should apply to breach of fair representation claims in the negotiation of agreements with railroads, rather than the six-month limitations period prescribed for unfair labor practices in Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). Each of the courts of appeals called upon to decide whether the *DelCostello* limitations period applies to unfair representation claims under the Railway Labor Act, and almost all of them have, has held that it does. (See BLE Pet. in No. 88-968 pp. 17-18).[2] Moreover, the same standards govern the duty of fair representation for a railroad union as a union covered by the National Labor Relations Act. As noted by the court in *Linder v. Berge*, 567 F. Supp. 913, 916 (D.R.I. 1983), in finding that there is no distinction with respect to these disputes under either Act:

> [T]he duty of fair representation is implied in the union's right to represent all members of the craft, and is not grounded on a specific statutory command. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967). In fact, the duty of fair representation initially arose in the roundhouse of railway labor relations, *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 202-04 (1944), and was only thereafter applied to unions regulated under the NLRA. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953). Thus, it is of little moment vis-a-vis the case at bar that the Supreme Court's decision in *DelCostello* was announced against an NLRA backdrop.

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[2] To the circuits cited therein, we should add *Linder v. Berge*, 739 F.2d 686 (1st Cir. 1984), and *Smallakoff v. Air Line Pilots Ass'n*, 825 F.2d 1544 (11th Cir. 1987), which said that the public, if dissatisfied with the consistent reasoning of the courts of appeals, "should look to Congress for correction." *Id.*, 1547.

Based upon this situation, it was concluded that if different periods were applied to claims under each Act, "the congressional will would be thwarted, the rationale of the Supreme Court in *DelCostello* would be undercut, and an inexplicable asymmetry between railroad workers and other union members in the fashioning of remedies for alleged breaches of essentially the same fair representational duty of their respective unions would senselessly be engrafted upon the law." *Id.*, 917.

Finally, it is significant that this Court emphasized in *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. *supra,* at 171, that the dual policies fostered by the application of the six-month period are promotion of stable collective bargaining relationships through uniform application of the agreement and rapid, final resolution of labor disputes. Those policies are most prominent in the factual situation before the Court in which the alleged breaches by CNW and BLE are alleged to have occurred through the failure to hire persons three years prior to the filing of the complaint or by the negotiation of the February 16, 1982 implementing agreement, almost twenty months prior to coming into court. These are simply not the type of claims that can be considered disputes that call for other rules of timeliness. These disputes call into play a different interest than that of an employee who is proceeding under the narrowest review provided under the law to attempt to set aside a decision of an arbitrator. The use of the period in which actions may be brought to enforce or set aside arbitration awards would be inconsistent with the underlying policies that the federal labor relations laws were intended to further

with respect to stable bargaining relationships and contracts.

2. The questions cross-petitioners raise regarding the application of summary judgment principles to the tolling issues raised by them are neither important nor novel, and only involve the question whether the court of appeals or district court correctly assessed the record made on summary judgment. As cross-petitioners admit at page 9 of their petitions, they "alleged," "indicate[d]," and "argued," but nowhere either before the district court or the court of appeals, or even before this Court, did they establish or prove that (a) they did not know about their alleged injury; or (b) they exercised due diligence to discover their injury after the negotiation of the agreements they desire to set aside; or (c) the unions engaged in purposeful misconduct or fraudulent activities in order to conceal the injury from them. And the district court held that cross-petitioners failed to demonstrate that they acted with "due diligence" and failed to show that there was fraudulent concealment of the claim. (Pet. App. 112a).

Cross-petitioners attempt to circumvent the holding below on the basis that the movants had the burden to establish that there is no genuine issue of material fact. In other words, cross-petitioners are contending that the parties filing a motion for summary judgment are saddled with the task of showing that no evidence exists to support cross-petitioners' defense. Whatever merit that contention once had it is no longer valid in light of this Court's decisions in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Rule 56(e), Fed. R. Cir. P., specifically places on the nonmovant the responsibility of countering motions for summary judgment supported by affidavits or other proper evidence. Thus, when a party moving for summary judgment has carried its burden of demonstrating the absence of a genuine issue of material fact, the "nonmovant party must come forward with 'specific facts showing that there is a genuine issue for trial.' " *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. *supra*, at 587. Cross-petitioners did not and cannot satisfy this burden, as they have attempted throughout, by simply showing that there is some "metaphysical doubt as to the material facts," here, the fact that the transfer of the physical assets from Rock Island to CNW was approved by the bankruptcy court on June 20, 1983, and therefore may have created some doubt in cross-petitioners' minds as to their final rights. *Id.*, 586. In further explaining the standards applicable to the consideration of summary judgment, the Court has held that in order to defeat a properly supported motion for summary judgment, the nonmovant must produce "concrete evidence from which a reasonable juror could return a verdict in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

Accordingly, there can be no doubt that the trail court applied a correct standard in granting summary judgment on the record before it. The determination that cross-petitioners had failed to demonstrate a factual predicate for their discovery and fraudulent concealment contentions raises no question as to the grant of summary

judgment on the limitations issue which warrants review by this Court.

3. Finally, cross-petitioners raise a number of miscellaneous points to support their conclusion that the *DelCostello* six-month period should not apply to suits to compel arbitration, unless the grievance-arbitration provisions of the labor contracts so provide or the complainants had sought arbitration within six-months following application of the substantive provisions of the contract and had been refused. This argument appears to turn all logic upon its head. First, the argument is contrary to this Court's holding in *Lodge 1424, International Ass'n of Machinists v. NLRB*, 362 U.S. 411 (1960), that an injured party has six-months from the execution of the agreement to seek to enforce or prevent enforcement of its terms. Here, one group of cross-petitioners seeks to enforce the provisions of the March 4, 1980 Agreement, as they read its terms, to CNW's refusal to hire them or by hiring them under improper conditions in 1980 and early 1981. Another group of cross-petitioners is claiming that the February 16, 1982 seniority implementing agreement breached the terms of the March 4, 1980 Agreement and, therefore, is unenforceable. Both of the aforedescribed types of claims arose more than six months prior to the filing of the complaints below.

Second, if arbitration is the appropriate forum in which to determine the claims of cross-petitioners,[3] the

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[3] Cross-petitioners seem to also assert that their claims may be heard in arbitration, notwithstanding being time-barred, because this Court stated that even frivolous claims are to be decided by an arbitrator in its opinion in *AT&T Technologies v. Communication Workers of America*, 475 U.S. 643, 649-50

various courts of appeals have uniformly held, up to the decision below at least, that *DelCostello* applies to actions to compel arbitration. (See Pet. in No. 88-994, at pp. 9-10). And finally, one of the major premises of the federal labor policy is the speedy resolution of labor disputes, particularly those that would disrupt stable bargaining relationships – the situation presented here. It makes no sense under the involved circumstances to permit an individual or group of individuals to wait years after execution of the agreements, accepting what benefits they may receive under them, and then be permitted to sue to set them aside.

In sum, though cross-petitioners' ancillary arguments may be unique, it appears clear as to why they were summarily disposed of or not addressed at all by the court below.

(Continued from previous page)

(1986). (*See* Briefs in opposition in Nos. 88-968, p. 15). Not only did cross-petitioners not seek out this relief in their complaints, but they try to extend that decision beyond its boundaries. A full reading of the decision affirms two long-established propositions, neither of which cuts in favor of cross-petitioners' arguments: First, the question of whether there is a duty to arbitrate is an issue for judicial determination (*id.*, 649) – obviously, it follows that the duty is extinguished if not timely exercised and if the court lacks jurisdiction to issue an enforceable determination. Second, the courts are not to construe collective bargaining contracts in the first instance and are not to rule on the potential merits of the underlying claims (*id.*, 650); however, the Eighth Circuit did base its decision on its interpretation of the involved agreements, and improperly specified the decision-making functions left to the arbitrator.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated in the petition of the Brotherhood of Locomotive Engineers in Docket No. 88-968, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit on the issue posed therein. However, the cross-petitions in Nos. 88-1176 and 88-1184 should be denied.

Respectfully submitted,

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